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CONTROLLED SUBSTANCES—CONSPIRACY 21 U.S.C. § 846

Title 21, United States Code, Section 846, makes it a crime for anyone to conspire with someone else to commit a violation of certain controlled substances laws of the United States. In this case, the defendant is charged with conspiring to _____ (*describe the object of the conspiracy as alleged in the indictment, e.g., possess with intent to distribute a controlled substance, and give elements of object crime unless they are given under a different count of the indictment*).

A “conspiracy” is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of “partnership in crime” in which each member becomes the agent of every other member.

_____ (*name controlled substance*) is a controlled substance within the meaning of federal law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That two or more persons, directly or indirectly, reached an agreement to _____ (*describe the object of the conspiracy*);

Second: That the defendant knew of the unlawful purpose of the agreement; and

Third: That the defendant joined in the agreement willfully, that is, with the intent to further its unlawful purpose.

[*Fourth:* That the overall scope of the conspiracy involved at least _____ (*describe quantity*) of _____ (*name controlled substance*), and

Fifth: That the defendant knew or reasonably should have known that the scope of the conspiracy involved at least _____ (*describe quantity*) of _____ (*name controlled substance*).]

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him [her] for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the indictment were

actually agreed upon or carried out, nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. A person who has no knowledge of a conspiracy, but who happens to act in a way that advances some purpose of a conspiracy, does not thereby become a conspirator.

Note

This instruction is also applicable to an offense under 21 U.S.C. § 963 with appropriate modifications for a conspiracy alleging importation as the object of the conspiracy.

If the evidence warrants, the following instruction may be added:

“The government must prove beyond a reasonable doubt that the defendant knew he [she] was possessing a controlled substance but need not prove that the defendant knew what particular controlled substance was involved.”

See United States v. Gamez-Gonzalez, 319 F.3d 695, 700 (5th Cir. 2003). If multiple objects of the conspiracy are charged in the indictment, the jury need not unanimously agree on the object of the conspiracy to convict, though the type of controlled substance will affect sentencing. *See United States v. Patino-Prado*, 533 F.3d 304 (5th Cir. 2008).

The elements of a drug conspiracy are described in *United States v. Lara*, 23 F.4th 459, 470-71 (5th Cir. 2022), *United States v. Aguirre-Rivera*, 8 F.4th 405, 410 (5th Cir. 2021), *United States v. Suarez*, 879 F.3d 626, 631-32 (5th Cir. 2018), *United States v. Chapman*, 851 F.3d 363, 375-78 (5th Cir. 2017), *United States v. Kiekow*, 872 F.3d 236, 245-46 (5th Cir. 2017), and *United States v. Vargas-Ocampo*, 747 F.3d 299, 303 (5th Cir. 2014) (en banc).

“Conspiracies must feature an agreement, although the agreement can be informal and unspoken. The agreement can be proven by circumstantial evidence alone, but cannot be ‘lightly inferred.’ ‘Once the government presents evidence of a conspiracy, it only needs to produce slight evidence to connect an individual to the conspiracy.’ A defendant can be convicted of conspiracy even if ‘he only participated at one level . . . and only played a minor role.’” *United States v. McClaren*, 13 F.4th 386, 402 (5th Cir. 2021).

The fourth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges a type and quantity of a controlled substance that would result in a mandatory minimum or enhanced statutory maximum penalty under 21 U.S.C. § 841(b). *See Alleyne v. United States*, 113 S. Ct. 2151 (2013); *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000); *United States v. Turner*, 319 F.3d 716, 721-22 (5th Cir. 2003); *United States v. Clinton*, 256 F.3d 311, 314 (5th Cir. 2001); *United States v. DeLeon*, 247 F.3d 593, 597 (5th Cir. 2001). The Fifth Circuit has described the

inclusion of this fourth element as “preferable,” but not required in all situations. *United States v. Daniels*, 723 F.3d 562, 574 (5th Cir.), *modified in part on reh’g*, 729 F.3d 496 (5th Cir. 2013). Generally, the exact quantity of the controlled substance in a substantive controlled substance charge need not be determined so long as the jury establishes a quantity at or above a given baseline amount in the appropriate subsection of § 841(b). For example, in a marijuana case, if the amount is determined to be at least 100 kilograms, the maximum sentence would be the same for any amount up to 999 kilograms. *See* 21 U.S.C. § 841(b)(1)(B)(vii); *DeLeon*, 247 F.3d at 597 (holding that an indictment’s allegation of a drug-quantity range, as opposed to a precise drug quantity, is sufficient to satisfy *Apprendi* and its progeny).

If there is a factual dispute, however, as to what type of controlled substance is the object of the conspiracy, or whether the amount is above or below a particular baseline (e.g., 100 kilograms of marijuana versus 99 kilograms), the court should consider submitting the type of controlled substance and the higher amount in the fourth element, accompanied by Instruction No. 1.35, Lesser Included Offense, for the lower amount. Alternatively, the court may substitute for the fourth element special interrogatories asking the jury to indicate the total amount of the controlled substance it believes was proved beyond a reasonable doubt. *See United States v. Arnold*, 416 F.3d 349, 356 (5th Cir. 2005) (approving use of special interrogatory).

An alternative manner of submitting maximum and minimum amounts of a controlled substance is included in the instructions concerning possession with intent to distribute (Instruction No. 2.95A) and that Special Verdict Form may be tailored for use in a conspiracy charge should the court find it more desirable. Whatever approach is used, the jury’s finding as to the scope of the overall conspiracy establishes the minimum and maximum sentencing range. *See United States v. Hinojosa*, 749 F.3d 407, 412–13 (5th Cir. 2014) (holding that jury must find a fact that triggers a mandatory minimum penalty or that enhances a statutory maximum penalty, but that the *Alleyne* opinion did not imply that the traditional fact-finding on relevant conduct, to the extent it increases the discretionary sentencing range for a district judge under the guidelines, must now be made by jurors).

In a drug conspiracy, however, two separate findings are required. One is the fourth element in this instruction—the type and quantity of controlled substances involved in the entire conspiracy, and the other is the fifth element of this instruction—the type and quantity that each particular defendant knew or should have known was involved in the conspiracy. The need for these findings to be made by a jury was confirmed by the Fifth Circuit in *Turner*, 319 F.3d at 722–23 (government must prove requisite drug quantity involved in conspiracy beyond a reasonable doubt), and *United States v. Haines*, 803 F.3d 713, 741–42 (5th Cir. 2015) (*Apprendi* and *Alleyne* require the jury, rather than the court, to determine the amount each defendant knew or should have known was involved in the conspiracy). *Haines* has been reaffirmed in several published cases: *United States v. Montemayor*, 55 F.4th 1003, 1012 (5th Cir. 2022); *United States v. Aguirre-Rivera*, 8 F.4th 405, 410 (5th Cir. 2021); *United States v. Jones*, 969 F.3d 192, 198 (5th Cir. 2020); *United States v. Staggers*, 961 F.3d 745, 762 (5th Cir. 2020); *United States v. Benitez*, 800 F.3d 243, 250 (5th Cir. 2015); and *United States v. Koss*, 812 F.3d 460, 465 n.3 (5th Cir. 2016); *see also McClaren*, 13 F.4th at 411 (holding that “[t]he government need not seize the actual amount charged to meet its burden” and “[t]he jury can find the drug quantity by extrapolating from the testimony”) (quoting *United States v. Walker*, 750 F. App’x 324, 326 (5th Cir. 2018)).

A jury's finding on the fifth element will not negate guilt. "[B]ecause the drug quantity is not a formal element of the conspiracy offense, the jury's answer to the second special interrogatory negated only the sentencing enhancement under § 841(b), not the general guilty verdict. The jury specifically found that the government had proven the existence of a conspiracy involving one kilogram or more of heroin and that Aguirre-Rivera was a participant in that conspiracy. But the jury then concluded that the government had not proven beyond a reasonable doubt that Aguirre-Rivera 'knew or reasonably should have known that the scope of the conspiracy involved at least one kilogram or more of a mixture of substance containing a detectable amount of heroin.' This finding speaks only to the amount of drugs for which Aguirre-Rivera could be held responsible—the drug quantity. Under *Daniels*, this affected only 'the sentence that the district court [could have] imposed[d].' *Daniels*, 723 F.3d at 573. Because the jury's general guilty verdict was untouched, the district court did not err in denying Aguirre-Rivera's motion for judgment of acquittal." *United States v. Aguirre-Rivera*, 8 F.4th 405, 411 (5th Cir. 2021), *cert. denied*, 142 S.Ct. 807 (2022).

Although *Haines* addresses the issue of drug quantity rather than drug type, the type of controlled substance likewise can affect the minimum penalty available. Accordingly, an individualized jury finding as to drug type is required, especially in those conspiracies involving multiple drug types. In *United States v. Hill*, 80 F.4th 595, 604–05 (5th Cir. 2023), the Fifth Circuit considered a jury charge that instructed the jury to determine whether the defendant "knew that the scope of the conspiracy involved at least a detectable amount of heroin or at least 280 grams of a mixture or substance containing cocaine base." Since the charge was drafted in the disjunctive, there was no express finding that the defendant knew that the conspiracy involved at least 280 grams of cocaine base. The Court found that "there is a reasonable probability that, but for the error, Hill would have received a significantly shorter sentence." *Id.* at 605.

"Knowledge" and "intent" are used in their common meaning in the conspiracy and possession statutes and therefore do not require further instruction. See *United States v. Canoguel*, 167 F.3d 900, 906 (5th Cir. 1999) ("knowledge"); *United States v. Sanchez-Sotello*, 8 F.3d 202, 212 (5th Cir. 1993) ("knowledge" and "intent"). Intent to distribute may be inferred from a large quantity of illegal narcotics, the value and quality of the drugs, and the possession of drug paraphernalia. See *United States v. Valdez*, 453 F.3d 252, 260 n.7 (5th Cir. 2006); *United States v. Redd*, 355 F.3d 866, 873 (5th Cir. 2003); see also *United States v. Williamson*, 533 F.3d 269, 270 (5th Cir. 2008) (intent to distribute could be inferred from possession of digital scales and 90.89 grams of cocaine base). If a "personal use" instruction is appropriate, it should "adequately inform [] the jury of its task: i.e., to determine whether the quantity is consistent with personal use and, if so, to find no inference of an intent to distribute without other evidence." *United States v. Cain*, 440 F.3d 672, 674–75 (5th Cir. 2006).

Unlike under the general conspiracy statute, 18 U.S.C. § 371, the government need not prove an overt act by the defendants in furtherance of a drug conspiracy. See *United States v. Shabani*, 115 S. Ct. 382, 383 (1994); *United States v. Daniels*, 723 F.3d 562, 575 (5th Cir. 2013); *United States v. Lewis*, 476 F.3d 369, 383 (5th Cir. 2007) (citing *Turner*, 319 F.3d at 721)); *United States v. Montgomery*, 210 F.3d 446, 449 (5th Cir. 2000).

Proof that a defendant is guilty of a conspiracy does not support a conviction that the defendant is guilty of a substantive count charging conduct committed by another conspirator in the absence of a *Pinkerton* instruction. See *United States v. Polk*, 56 F.3d 613, 619 (5th Cir. 1995); Instruction No. 2.17, Conspirator’s Liability for Substantive Count; *Pinkerton v. United States*, 66 S. Ct. 1180, 1184 (1946).

Failure to instruct on the elements of the “object” crime of the conspiracy is at least “serious” error, if not plain error. See *United States v. Vaglica*, 720 F.2d 388, 391 (5th Cir. 1983); see also *United States v. Hale*, 685 F.3d 522, 540–41 (5th Cir. 2012); *United States v. Smithers*, 27 F.3d 142, 146 (5th Cir. 1994). Accordingly, the elements of the “object” crime of the conspiracy, as alleged in the indictment, should be included in the instructions pertaining to the conspiracy count, unless they are given under a different count of the indictment.

Where evidence at trial indicates that some of the defendants were involved only in separate conspiracies unrelated to the overall conspiracy charged in the indictment, a defendant is entitled to an instruction on that theory. See *United States v. Mitchell*, 484 F.3d 762 (5th Cir. 2007); *United States v. Stowell*, 947 F.2d 1251, 1258 (5th Cir. 1991); see also *United States v. Carbajal*, 290 F.3d 277, 291 n.25 (5th Cir. 2002); *United States v. Cyprian*, 197 F.3d 736, 741 (5th Cir. 1999) (stating that because the defendant made no request, the absence of a multiple conspiracies jury instruction was not “plain error”). See Instruction No. 2.16, Multiple Conspiracies.

“Proof of the buyer–seller agreement, without more, is not sufficient to tie a buyer to a conspiracy.” *United States v. Scroggins*, 379 F.3d 233, 263 (5th Cir. 2004) (citation omitted). So long as the jury instruction given by the trial court accurately reflects the law on conspiracy, however, there need not be a separate instruction on the defense of a “mere buyer–seller relationship.” See *United States v. Asibor*, 109 F.3d 1023, 1034–35 (5th Cir. 1997) (citing *United States v. Maseratti*, 1 F.3d 330, 336 (5th Cir. 1993)); *United States v. Delgado*, 672 F.3d 320, 341 (5th Cir. 2012); *United States v. Mata*, 517 F.3d 279 (5th Cir. 2008) (specifically approving this instruction as adequate, obviating the need for a specific buyer–seller instruction).